Cr. 1901. No. 264.

FILED
MAR 5 1901
JAMES H. McKENNEY,
Clerk.

Brf. of Springer for Appellee (on

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IN THE SUPREME COURT

Filed Mar. 5, 1901.

OF THE

UNITED STATES OF AMERICA.

JANUARY TERM, 1901.

DANIEL W. HARDING } Plaintiff Appellant,
vs.
MYRTLE GILLETT, } Defendant Appellee.

Brief and Argument of Defendant's Appeal.

Motion to Dismiss.

GEO. P. RUSH,

Att'y for Plaintiff.

Wm M Springer

Of Counsel for Appellee

IN THE SUPREME COURT

OF THE

UNITED STATES OF AMERICA.

JANUARY TERM, 1901.

DANIEL W. HARDING } Plaintiff Appellant,
vs.
MYRTLE GILLETT, } Defendant Appellee.

Brief and Argument of Defendant's Appeal.

Motion to Dismiss.

The appeal should be dismissed for the following reasons:

1st. The amount involved is not sufficient to give the court jurisdiction.

2nd. The jurisdiction is determined by the amount directly involved in the decree appealed from, and not by any contingent demands or losses of either party.

3rd. Because the decree appealed from is a joint decree against John Romig and Daniel W. Harding in favor of Myrtle Gillett, and John Romig is not made a party to this appeal.

4th. The main or original cause of action is still pending and undisposed of in the District Court of Garfield county, Oklahoma.

The suit was to foreclose a mortgage given by Don Gillett to John Romig for $700.00. After giving the mortgage, Don Gillett conveyed the property to Myrtle Gillett. Suit to foreclose the mortgage was commenced and service had upon Don Gillett and MYRTLE GILLETT by publication. The judgment was rendered and land sold and bought in by Romig and conveyed to Harding. Afterwards Myrtle Gillett filed her motion to set

aside the judgment upon the grounds that the service was void as to her. The motion was sustained and the judgment set aside, and the sheriff was ordered to restore her to the possession of the land.

Now the only thing involved in this suit is the judgment setting aside the decree of foreclosure for $700.00 and interest.

The fact that Harding's title depends upon the validity of this judgment cannot give the Supreme Court jurisdiction to review it.

"The jurisdiction is determined by the amount directly involved in the decree appealed from, and not by any contingent demands or losses of either party."

Hollander vs. Fickheimer, 162 U. S. 326.
Security Co. vs. Gay, 145 U. S. 12.

That part of the judgment which restores Myrtle Gillett to possession pending the further proceedings in the foreclosure suit would not give the Supreme Court jurisdiction, as that only involves the value of the right of possession.

Willis vs. Eastern Trust & Banking Co., 167 U. S. 76.

All the parties interested must be made parties to the appeal.

Beardsley vs. Arkansas & L. R'y Co., 15 Sup. Ct. R. (West) 786.

Sipperly vs. Smith, 155 U. S. 86.

Wilson vs. Kiesel, 164 U. S. 248.

Davis vs. Mercantile Trust Co., 152 U. S. 590.

This last case is especially important, as it holds that the purchaser at a foreclosure sale and the mortgagor are both necessary parties to an appeal.

The original foreclosure suit is still pending in the District court of Garfield county, Oklahoma. The judgment setting aside the decree of foreclosure for the reason that there was no service on Myrtle Gillett simply leaves the foreclosure suit pending there and they can get service upon her and proceed at any time.

Myrtle Gillett having been wrongfully dispossessed by an order of the court, it had jurisdiction and it became its duty to restore her to possession of the land pending the foreclosure.

Ency. Pleading and Practice, Vol. 2, page 965 et seq.

Chamberlain vs. Choles, 35 N. Y. App. 477.

GEO. P. RUSH,

Att'y for Plaintiff.

Wm. M. Springer

Of Counsel for Appellee

APR 29 1901
JAMES H. McKENNEY,
Clerk.

Motion to quash supersedeas.

IN THE SUPREME COURT

Filed April 29, 1901.
OF THE

UNITED STATES.

OCTOBER TERM, 1900.

JOHN ROMIG AND
DANIEL W. HARDING,
Appellants,

vs.

MYRTLE GILLETT,
Appellee.

No. 584.

MOTION TO QUASH SUPERSEDEAS.

Now comes the Appellee in this cause and moves this Honorable Court to vacate and quash the order of Supersedeas entered in this cause by the Honorable Bayard T. Hainer, Associate Justice of the Supreme Court of Oklahoma Territory on the 24th day of January A. D. 1901. The order itself and also the record of the judgment entered in said

cause signed by the Clerk of said Court on the 16th day of February, A. D. 1901, are hereto attached and made a part of this motion.

The grounds for this motion are that, as will appear from the said order of Supersedeas and the said record of the judgment in this cause, the judgment of the Supreme Court of Oklahoma, from which this second appeal has been taken in this cause, was entered on the 15th day of September, A. D. 1900, and that this second appeal was taken from the judgment of the Supreme Court of Oklahoma Territory in this cause on the 22d day of January, 1901, and that the Supersedeas order was entered in said cause on the 24th day of January, A. D. 1901, which was more than 60 days after the rendition of judgment in said cause, or 130 days. While appeals may be taken from the final judgment of the Supreme Court of a Territory within two years after rendition of judgment, yet in order to obtain a Supersedeas, the appeal or writ of error must be taken within 60 days after rendition of the judgment from which the appeal is taken.

Appellee therefore moves this Honorable Court

to vacate and quash the said order of Supersedeas issued in this cause.

GEO. P. RUSH,
WILLIAM M. SPRINGER,
Attorneys for Appellee.

To J. M. WILSON and C. R. BUCKNER and
L. N. HOUSTON,
Attorneys of record for Appellants in the above entitled cause:

You are hereby notified that the Appellee in the above entitled cause will on Monday, the 29th day of April, A. D. 1901, on the meeting of the Supreme Court of the United States, on that day, or as soon thereafter as Counsel can be heard, submit for the consideration of the Court the foregoing motion, and the Brief thereon hereto attached.

GEO. P. RUSH and
WILLIAM M. SPRINGER,
Attorneys for Appellee.

Service of above notice is hereby acknowledged this 13th day of April, 1901, at Enid, in Garfield

County, Oklahoma, by delivery of a copy thereof.

L. N. HOUSTON and

C. R. BUCKNER and

J. M. WILSON,

Attorneys for Appellants.

APR 29 1901
JAMES H. McKENNEY,
Clerk.

Motion to dismiss.

IN THE SUPREME COURT

Filed April 29, 1901.

OF THE UNITED STATES.

OCTOBER TERM, 1900

JOHN ROMIG AND
DANIEL W. HARDING,
Appellants,

vs.

MYRTLE GILLETT,
Appellee.

No. 584.

MOTION TO DISMISS.

Now comes the appellee in this cause and moves this Honorable Court to dismiss the appeal herein, because she says this Court has no jurisdiction of the same, or to hear and determine the matters sought to be brought before the Court by such appeal.

GEO. P. RUSH and
WILLIAM M. SPRINGER,
Attorneys for Appellee.

To J. M. WILSON and C. R. BUCKNER and
L. N. HOUSTON,
Attorneys of record for Appellants in the above entitled cause:

You are hereby notified that the Appellee in the above named cause will on Monday, the 29th day of April, A. D. 1901, on the meeting of the Supreme Court of the United States, on that day, or as soon thereafter as Counsel can be heard, submit for the consideration of the Court the foregoing motion, and the Brief thereon hereto attached.

GEO. P. RUSH and
WILLIAM M. SPRINGER,
Attorneys for Appellee.

Service of this notice acknowledged this 13th day of April, 1901, at Enid, in Garfield County, Oklahoma, by delivery of a copy thereof.

L. N. HOUSTON and
C. R. BUCKNER and
J. M. WILSON,
Attorneys for Appellants.

APR 29 1901
JAMES H. McKENNEY,
Clerk.

Extract from Record.

IN THE SUPREME COURT OF THE UNITED STATES.

Filed April 29, 1901.

OCTOBER TERM, 1900.

JOHN ROMIG and
DANIEL W. HARDING,
Appellants,
vs.
MYRTLE GILLETT,
Appellee.

No. 584.

Extracts from MSS. Record, Printed by Appellee, in Support of Motion to Dismiss Appeal.

GEO. P. RUSH AND
WILLIAM M. SPRINGER,
Attorneys for Appellee.

IN THE SUPREME COURT

OF THE

UNITED STATES.

OCTOBER TERM, 1900.

JOHN ROMIG and
DANIEL W. HARDING,
Appellants,
vs.
MYRTLE GILLETT,
Appellee.

No. 584.

Extracts from manuscript Record, printed by Appellee in support of motion to dismiss appeal in this case:

JUDGMENT OF FORECLOSURE.

In the District Court of Garfield County, Oklahoma Territory.

(Record, page 32.)

John Romig, Plaintiff,
vs.
Don A. Gillett and
Myrtle Gillett,
Defendants.

Journal Entry,
Case
No. 424.

December 18th, 1896.

Now on this day comes the said plaintiff, John

Romig, by his attorney, D. D. Temple, the said defendants, Don A. Gillett and Myrtle Gillett, come not but make default, although duly and legally served by publication for three consecutive weeks, in the WEEKLY EAGLE, a weekly newspaper printed and published in the city of Enid, Garfield county, Oklahoma Territory, and of general circulation in said Garfield county, Oklahoma Territory, and thereupon this cause came on for trial upon the petition herein, in open court. and with the consent of the court, waived the jury and submits his cause to the court. The court after hearing the arguments and the counsel find that all allegations and averments contained in the petition of said plaintiff, filed herein are true and that there was due $42.00 as interest on the principal of seven hundred ($700.00) dollars, on. the second day of February, 1896, and that the same is still due and unpaid at this date the sum of forty-two ($42.00) dollars from the said defendant, Don A. Gillett, and that the conditions of said mortgage were broken and by reason thereof the whole amount mentioned in said note and mortgage become due and payable, and that there is

due from the said defendant Don A. Gillett, to the said plaintiff on the note and mortgage sued on in this action the sum of seven hundred ($700.00) dollars, on the note mentioned in said petition; and sixty-six ($66.00) dollars, has interest due on the note, and the note specified that said indebtedness shall bear interest at the rate of twelve (12) per cent per annum, payable semi-annually in advance, and if said note was collected by suit an attorney fee of ten (10) per cent might be taxed as costs. (32d page.)

The court finds that the Defendant, Don A. Gillette, executed and delivered to the plaintiff, the mortgage deed set forth in said petition, on the following described real estate to-wit;

The east half of the northeast quarter of section eighteen (18) township twenty-two (22) range six (6) west of Indian Meridian, save and except a strip of land eighty feet wide off of the west side of said tract of land from the north to the southern boundary, and that said mortgage was duly recorded on the second day of February 1896, in the office of the Recorder of Deeds, of said Garfield County, Oklahoma Territory, in Book 2 at page 89.

That the deed from Don A. Gillett to Myrtle Gillette was made and executed subsequent to plaintiff's mortgage.

The court also finds that the said defendant Don A. Gillett made and delivered to the plaintiff, the seven hundred dollar note set forth in said petition, which said mortgage was given to secure. and that the forty-two dollars of interest was due on the second day of February, 1896, and unpaid, and before the commencement of this action, and is unpaid at this time and that the conditions of said mortgage having been broken, and that the whole of the debt secured by said mortgage was due, by reason of the default of the payment of the interest according to the terms of said mortgage, and the court further finds that the said plaintiff has a lien on the land, and the tenements in said petition described, by virtue of the mortgage, in said petition set out to secure the payment of said indebtedness.

It is therefore, considered, ordered, and adjudged by the court, that the plaintiff do have and recover all and from the said defendant Don A. Gillett the sum of ($42.00,) being the amount of default of in-

terest, and twenty-four dollars and fifty cents, accrued interests since commencement of the suit together with the principle mentioned in said petition of seven hundred dollars, by reason of said default in the payment of said interest, the amount found due with interest at the rate of twelve per cent per annum, from the date of this judgement and costs, and attorney's fees of seventy dollars, and that the premises described in said petition be sold to satisfy said judgement of seven hundred and sixty-six dollars and fifty cents, and cost of suit and an attorney fee of seventy dollars.

And it is further ordered and adjudged by the court, that in the case the said defendants, or any one of them, fails from and after the rendition of this judgement to pay the said plaintiff the said sum of seven hundred and sixty-six dollars and fifty cents, the amount so as aforesaid found due to said plaintiff, together with the interest thereon and the costs of this action, including the attorney fee of seventy dollars, an order of sale issued to the sheriff of said county and Territory, commanding him to advertise and sell according to

law, the lands and tenements in said petition described to-wit:

The East one half of the northeast quarter of section 18, township 22 north, range 6 west Indian Meridian, except a strip of land eighty feet wide off of the west side of said tract of land from the north to the southern boundary, lying and situated in the County of Garfield, Oklahoma Territory, and apply the proceeds arising from the sale.

First, to the payment of the costs of said sale and of this action and attorney fees.

Second, to the payment to the said plaintiff, said sum of seven hundred and sixty-six dollars and fifty cents the amount so as aforesaid found due the said plaintiff with the interests thereon.

Third, the residue, if any there be, he pay to the defendant, Don A. Gillett; and it is further ordered and adjudged by this court that from and after the sale of this land and tenements under and by the virtue of this judgment and decree, that the said defendant Don A. Gillett and Myrtle Gillett and all persons claiming under them, since the commencement of this action be, and are

forever barred, foreclosed of, and from all liens upon the right, title, interest, estate or equity or redemption of, in, or to said lands and tenements or any part thereof, and the Sheriff is hereby directed to place in possession the purchaser of said property.

[Signed] JNO. L. MCATER, Judge.

[Endorsed.] No. 424.

Journal Entry of Judgment.

Filed Jan. 20, 1897.

J. C. MCCLELLAND, Clerk.

By M. A. ALEXANDER, Deputy.

February 17, 1899. By order of sale, credit on Judgment of $298.10.

ORDER CONFIRMING SALE.

In the District Court, in and for the Fifth Judicial District, Garfield County, Oklahoma Territory.

(Record page 45.)

JOHN ROMIG, Plaintiff, vs. Don A. Gillett and Myrtle Gillett, Defendants.	No. 424 Journal Entry.

And now comes the said plaintiff, by D. D. Temple, his attorney, and on motion of said plain-

tiff, and on producing to the court the return of the Sheriff of this county, of a sale of real estate made by him on the 23rd day of February, 1897, to the said plaintiff, John Romig, on an order of sale, issued in this case and date the twenty-first day of January, 1897, and the court having carefully examined the proceedings of said Sheriff in making said sale, being satisfied that said sale has been made in all respects in conformity to law and the statutes in such cases made and provided. It is ordered and adjudged by the court that said sale and the proceedings be, and the same are hereby in all respects confirmed, and the Clerk of said court is hereby directed to make an entry on the journal that the court is satisfied with the legality of such sale, and the said Sheriff is ordered to execute to said John Romig, the said purchaser at said sale, a good and sufficent deed for said lands and tenements, so sold towit:

The east half of the northeast quarter, section 18, township 22, range 6 west of the Indian Meridian, lying and situate in the County of Garfield and Territory of Oklahoma, save and except a strip of land 80 feet wide off of the west side of said tract

of land from the north to the southern boundary.

It is further ordered that the said purchaser of said premises at said sale, be let into possession of said premises, and every part thereof, and that said defendants and every person who has come into possession under them, or either of them, since the commencement of this action, deliver possession thereof to said purchaser, on the production of the Sheriff's deed for said premises, and on refusal of the said defendants, or either of them, or any one in possession under them, or either of them as aforesaid, to deliver possession of said premises to said purchaser, that the Sheriff of said County put the said purchaser of said premises into possession of the same.

JOHN L. MCATEE,
Judge of the Fifth Judicial District,
Oklahoma Territory.

[Endorsed.]

No. 424.
John Romig, Plaintiff,
vs.
Don A. Gillett et al,
Defendants.

JOURNAL ENTRY ON CONFIRMATION OF SALE.

Filed March 1, 1897.

J. C. McCLELLAND,
Clerk of Dist. Court.
By C. J. WEST, Deputy.

MOTION TO SET ASIDE JUDGMENT.

(Record page 51.)

Thereafter, on the 11th day of May, 1898, Myrtle Gillett filed a motion to set aside the judgment heretofore rendered in favor of John Romig, against said Myrtle Gillett and Don A. Gillett. From the judgment of the Court upon the hearing of said motion, and the ruling of the Court upon the same, this appeal is taken, which motion, notice, and affidavits in the support of the same, is in words and figures as follows:

In the District Court of Garfield County,
Oklahoma Territory,

John Romig, Plaintiff,
vs.
Don A. Gillett and
Myrtle Gillett, Defendants.

MOTION TO SET ASIDE JUDGMENT.

Comes now the defendant, Myrtle Gillett, and

appearing for the purposes of this motion duly moves the Court to set aside the judgment in said cause rendered against her on the 18th day of December, 1896, in above Court, and all the proceedings had thereunder, for the reasons following, to-wit:

1st. That the Court had no jurisdiction of the defendant, Myrtle Gillett.

2nd. Because said Court had no jurisdiction to render said judgment.

3rd. Because the defendant was at all times during the pending of said action a resident of the Territory of Oklahoma, and was personally present therein during all aforesaid time and lived openly and notoriously within twenty miles of the real estate upon which the mortgage in said action was attempted to be foreclosed, and which was attempted to be sold under the order of sale issued in said cause, upon a farm in said Territory, where she had resided since the spring of 1889, and where she was well and familiarly known by everybody in the neighborhood, and had been for years prior to the commencement of said action, and no summons was ever served upon her in said action.

4th. That the attempted service by publication had in said cause upon the said Myrtle Gillett was irregular and void for the reason that the said Myrtle Gillett was a resident of said Territory and had not absconded from her usual place of abode in said Territory, nor had she so concealed herself that process could not be served upon her, nor had she departed from this Territory, nor from the county of her residence, with the intent to delay or defraud her creditors, or to avoid service of summons, or keep herself concealed therein for the purpose of avoiding service of summons; and for the further reason that the affidavit filed in said cause for the purpose of obtaining such service is not such as the law requires to be filed therefor.

ANDERSON & RUSH,
Attorneys for Myrtle Gillett.

JUDGMENT OF DISTRICT COURT OF GARFIELD COUNTY, OKLAHOMA.

Setting aside Judgment of District Court of Garfield County, (Record page 74,) March, 1899, Term. April 15, 1899. 35th Judicial day.

Among other things the following proceedings were had on this 15th day of April, 1899, the same

being the 35th Judicial day of the March, 1899, Term.

No. 424 John Romig, vs. Don A. Gillett.

And now on this 15th day of April, this cause coming on to be heard and the motion heretofore filed in this cause by the defendant, Myrtle Gillett, to vacate and set aside the judgment heretofore rendered in this cause and all the proceedings had thereunder as to her, the said Myrtle Gillett, the Court doth find that as to the said defendant, Myrtle Gillett, the judgment is void for want of jurisdiction, and that all the proceedings under said judgment were wrongful; that the order of sale should not have been issued; that the levy, advertisement and sale under said order of sale was wrongful and void; that the order putting the purchaser, John Romig, the plaintiff herein, into possession of said land and dispossessing defendant, Myrtle Gillett, was wrongful and an abuse of the process of this Court; that the possession of said John Romig and of his grantee, Daniel W. Harding, was wrongfully obtained and wrongfully maintained; that the defendant, Myrtle Gillett,

should in all respects be restored to her condition prior to entry of said void judgment and prior to her dispossession of said land by said void judgment under the void and unlawful order issued under said void judgment.

It is therefore ordered, adjudged and decreed that said judgment is void, that the order of sale, advertisement of sale, and the Sheriff's deed issued thereunder, are each and all wrongful and void, and that said judgment, order of sale, advertisement, appraisement, sale, report of sale and Sheriff's deed are each and all set aside and held for naught.

Judgment reserved upon the question of right of possession of————————and restitution.

To all of which plaintiff duly enters exception and by the Court overruled. (74.)

ORDER OF DISTRICT COURT OF GARFIELD COUNTY, OKLAHOMA.

Restoring Appellee to possession of land. (Record page 81.) May, 1899. Term. June 21st, 1899. 7th Judicial day.

Among other things the following proceedings were had on this 21st day of June, 1899, the same

being the 7th Judicial day of the May, 1899, Term.

No. 424. John Romig, vs. Don A. Gillett and Myrtle Gillett.

And now on this 21st day of June, 1899, the same being the 7th day of the May Term of the said Court, this cause coming on again to be heard upon the motion of the defendant, Myrtle Gillett, to set aside the judgment of foreclosure in this cause, and all the proceedings had thereunder upon the question reserved in the decision made and entered at the last term of this Court upon said motion, it is further ordered and adjudged that Myrtle Gillett be restored to the possession of said premises, to-wit: The east half of the north-east quarter of section eighteen (18) in township twenty-two (22) north, of range six (6) west, save and except a strip of land eighty feet wide off of the west side of said tract of land from the north to the southern boundary thereof, situated in the County of Garfield and Territory of Oklahoma, and that the plaintiff, John Romig, and his grantee, Daniel W. Harding, are hereby commanded forthwith to quit and surrender to said

Myrtle Gillett the full and complete possession of said premises and of each and every part thereof; and it is further ordered that unless the said John Romig and his said grantee, Daniel W. Harding, have not quit and surrendered possession of said premises and of each and every part thereof prior to the expiration of fifteen days from this date that then, upon a precipe being filed therefor by the said Myrtle Gillett or her attorneys of record, an order shall be issued out of the office of the Clerk of this Court, and directed to the Sheriff of this County, commanding him to forthwith remove the said John Romig and his grantee, Daniel Harding, and each of them, and all persons claiming by, through, or under them, or either of them, from said premises, and put the said Myrtle Gillett into possession thereof; and it is further ordered that said Myrtle Gillett have judgment against the plaintiff, John Romig, and the said Daniel W. Harding, for costs in this case expended, taxed at ——— ———dollars, to which the plaintiff and Daniel W. Harding excepts.

And the notice for a new trial heretofore filed herein by the plaintiff coming on to be heard, the

same was by the Court overruled, to which action of the Court the plaintiff then and there excepted.

And the motion for a new trial heretofore filed herein by Daniel W. Harding coming on to be heard, the same was by the Court overruled, to which action of the Court in so overruling said motion, the said Daniel W. Harding then and there excepted.

And afterwards, to-wit: On the 24th day of June, 1899, the plaintiff, John Romig, filed his motion for new hearing on the motion of Myrtle Gillett for possession of land described herein, which motion was by the Court considered and overruled, to which action of the Court John Romig then and there duly excepted; and afterwards, to-wit: On the 24th day of June, 1899, the grantee of the plaintiff. Daniel W. Harding, files his motion for new hearing and affidavit in support thereof on the motions of the defendant, Myrtle Gillett, which motion was by the Court considered and overruled, to which action of the Court the said Daniel W. Harding then and there duly excepted; and thereupon the plaintiffs, John Romig and Daniel W. Harding, each gave notice of appeal to the Su-

preme Court of the Territory of Oklahoma, and said plaintiffs, John Romig and Daniel W. Harding, were each by the Court given thirty days time to make and serve case made for the Supreme Court of the Territory, and the defendant, Myrtle Gillett, was by the court given fifteen days thereafter to suggest amendments, and the case to be settled upon five days' notice.

And it was further ordered and adjudged by the Court that the plaintiffs, John Romig and Daniel W. Harding, give an appeal bond in the sum of One Thousand Dollars, conditioned as provided by law, and to be approved by the Clerk of said Court; upon the filing and approval of such bond no process shall issue on said order until the determination of said cause in the Supreme Court.

(From the MSS. Record, page 112.)

Certificate of Clerk.

United States of America, } In the Supreme Court of
Territory of Oklahoma. } ss. Oklahoma Territory.

John Romig and Daniel W. Harding, Appellants,

vs.

Myrtle Gillette, Appellee.

I, Benj. F. Hegler, Clerk of the Supreme Court

of the Territory of Oklahoma, do hereby certify that on the 15th day of September, 1900, a mandate was issued in conformity to law, to the District Court of Garfield County, of the Fifth Judicial District of the Territory of Oklahoma, sitting in and for Garfield County, affirming a judgment of said District Court entered in the Clerk's office to said District Court on the 21st day of June, 1899.

On the 29th day of September, 1900, an appeal was allowed by the Supreme Court of said Territory to the Supreme Court of the United States, for the review of the judgment and order of the Supreme Court of said Territory heretofore referred to, signed by Honorable John H. Burford, Chief Justice of the Supreme Court of Oklahoma Territory, and issued out of the Clerk's office of the Supreme Court of said Territory, giving the Appellants sixty days in which to perfect their appeal from the judgment of the Supreme Court of said Territory.

That afterwards, to-wit: At the October Term, 1900, of said United States Supreme Court, as evidenced by a mandate therefrom, which said mandate bears date December 28, 1900, said appeal

was docketed and dismissed with costs.

That afterwards, to-wit: On the 22d day of January, 1901, a second appeal of said cause was granted by the Honorable Bayard T. Hayner, Associate Justice of the Supreme Court of said Territory, and issued out of the Clerk's office of the Supreme Court of said Territory, giving the Appellant thirty days in which to perfect said second appeal from said judgement of said Supreme court of said Territory.

That afterwards, to-wit: January 25, 1901, the Supersedeas bond herein was duly filed, approved and signed by the Hon. Bayard T. Hainer, Associate Justice as aforesaid, and a certified copy of the Citation in this cause was duly served on the attorney for Appellee on the 8th day of February, 1901.

In testimony whereof, I have caused the seal of said Court to be hereunto affixed at the city of Guthrie in the Territory of Oklahoma, on the 16th day of February, A. D. 1901.

BENJ. F. HEGLER,

Clerk Supreme Court of Oklahoma Territory.

Brf. of Springer for Appellee (Mo. to dis.)

APR 29 1901
JAMES H. McKENNEY,
Clerk

IN THE SUPREME COURT
Filed April 29, 1901.
OF THE
UNITED STATES.

OCTOBER TERM, 1900.

JOHN ROMIG and
DANIEL W. HARDING,
Appellants,
vs.
MYRTLE GILLETT,
Appellee.

No. 584.

Brief and Argument of Appellee in Support of Motion to Dismiss Appeal.

GEO. P. RUSH AND
WILLIAM M. SPRINGER,
Attorneys for Appellee.

IN THE SUPREME COURT

OF THE

UNITED STATES.

OCTOBER TERM, 1900.

JOHN ROMIG and
DANIEL W. HARDING,
Appellants,

vs. No. 584.

MYRTLE GILLETT,
Appellee.

BRIEF AND ARGUMENT OF APPELLEE

In support of motion to dismiss Appeal.

The appeal should be dismissed for the following reasons:

1st. The amount involved is not sufficient to give the court jurisdiction.

2nd. The jurisdiction is determined by the amount directly involved in the decree appealed from and not by any contingent demands or losses of either party.

3rd. The main or original cause of action is

still pending and undisposed of in the District Court of Garfield county, Oklahoma.

The suit was to foreclose a mortgage given by Don Gillett to John Romig for $700. After giving the mortgage, Don Gillett conveyed the property to Myrtle Gillett. Suit to foreclose the mortgage was commenced and service had upon Don Gillett and Myrtle Gillett by publication. The judgment was rendered and land sold and bought in by Romig and conveyed to Harding. Afterwards Myrtle Gillett filed her motion to set aside the judgment upon the grounds that the service was void as to her. The motion was sustained and the judgment set aside and the sheriff was ordered to restore her to the possession of the land.

Now the only thing involved in this suit is the judgment setting aside the decree of foreclosure for $700 and interest.

The fact that Harding's title depends upon the validity of this judgment cannot give the Supreme Court jurisdiction to review it.

"The jurisdiction is determined by the amount directly involved in the decree appealed from, and not by any contingent demands or losses of either

party."

Hollahder vs. Fickheimer, 162 U. S. 326.

Security Co. vs. Gay, 145 U. S. 12.

That part of the judgment which restores Myrtle Gillett to possession pending the further proceedings in the foreclosure suit would not give the Supreme Court jurisdiction, as that only involves the value of the right of possession.

Willis vs. Eastern Trust & Banking Co., 167 U. S. 76.

By the act of congress of May 2, 1900, to provide a temporary government for Oklahoma Territory, it was provided as follows:

"Writs of error and appeals from the final decisions of said Supreme Court shall be allowed and may be taken to the Supreme Court of the United States in the same manner and under the same regulations as from the Circuit courts of the United States, where the value of the property or the amount in controversy, to be ascertained by oath or affirmation of either party or other competent witness, shall exceed five thousand dollars."

Sup. Rev. Stats. Vol. 1, Second Edition 1874-1891, page 724.

This provision has been disregarded. The "value of the property or the amount in controversy" is to be ascertained by the oath of either party, or by other competent witnesses and it must exceed five thousand dollars. The extracts from the record printed herewith show that the amount in controversy is less than one thousand dollars, and no affidavit has been put in the record ascertaining even that fact. If appellants rely, in support of their right of appeal to this court, upon a greater value than is indicated in the record, they should have shown affirmatively by affidavits what that value was.

The amount shown by the record and the pleadings, taken as a whole, when these disclose the real sum in dispute, is determinative of the question of jurisdiction. (11 Encyp. of P. and P. pages 713-4, and numerous authorities therein cited. including twelve cases decided by this court). Affidavits cannot contradict the record, and affidavits as to value of the land itself cannot confer jurisdiction when the only question involved is the setting aside a judgement of foreclosure for $700.

And the record must affirmatively show the amount in controversy in order that the court may take jurisdiction. (1 Encyp. of P. and P. page 717, and authorities therein cited). The amount will not be presumed The law raises no presumptions in the absence of affirmative showing of the amount in controversy as to what the real amount may be. Id.

The original foreclosure suit is still pending in the District court of Garfield county, Oklahoma. The judgment setting aside the decree of foreclosure for the reason that there was no service on Myrtle Gillett simply leaves the foreclosure suit pending there and they can get service upon her and proceed at any time.

Myrtle Gillett having been wrongfully dispossessed by an order of the court, it had jurisdiction and it became its duty to restore her to possession of the land pending the foreclosure.

Ency. Pleading and Practice, Vol. 2, page 965 et seq.

Chamberlain vs. Choles, 35 N. Y. App. 477.

GEO. P. RUSH AND
WILLIAM M. SPRINGER,
Attorneys for Appellee.

APR 29 1901
JAMES H. McKENNEY
Clerk

Brf. of Springer for Appellee (Mo. to Quash)

IN THE SUPREME COURT OF THE UNITED STATES.

Filed April 29, 1901.

OCTOBER TERM, 1900.

JOHN ROMIG and
DANIEL W. HARDING,
Appellants,
vs.
MYRTLE GILLETT,
Appellee.

No. 584.

Brief of Appellee, in Support of Motion to Quash Supersedeas.

GEO. P. RUSH AND
WILLIAM M. SPRINGER,
Attorneys for Appellee.

IN THE SUPREME COURT

OF THE

UNITED STATES.

OCTOBER TERM, 1900.

JOHN ROMIG and
DANIEL W. HARDING,
Appellants,
vs.
MYRTLE GILLETT,
Appellee.

No. 584.

BRIEF OF APPELLEE,

In support of motion to quash Supersedeas.

The grounds upon which this motion is made are stated in the motion itself, namely that the appeal now being prosecuted was not taken within sixty days from the date of the rendition of final judgment in the cause but was actually taken 130 days thereafter;

Rev. Stats. U. S. Secs. 1007-1008.

The Supersedeas order and the record of the entry of judgment in the case, have been extract-

ed from the record in the case, and printed herewith for the information of the Court.

The statutory requirements as to the manner and time of suing out a writ of error or of perfecting an appeal must be strictly observed in order to effect a Supersedeas or stay of proceedings pending the appeal or writ of error. 20 Encyp. of P. and P. page 1216, and numerous authorities cited therein.

GEO. P. RUSH AND
WILLIAM M. SPRINGER,
Attorneys for Appellee.

RECORD ON MOTION TO QUASH SUPERSEDEAS—MSS. Page 112.

I, Benj. F. Hegler, Clerk of the Supreme Court of the Territory of Oklahoma, do hereby certify that on the 15th day of Sept. 1900, a mandate was issued in conformity to law, to the District Court of Garfield County, of the Fifth Judicial District of the Territory of Oklahoma, sitting in and for Garfield County, affirming a judgment of said District Court entered in the Clerk's office of said District Court on the 21st day of June, 1899.

On the 29th day of September 1900, an appeal was allowed by the Supreme Court of said Territory to the Supreme Court of the United States, for the review of the judgment and order of the Supreme Court of said Territory heretofore referred to, signed by Honorable John H. Burford, Chief Justice of the Supreme Court of Oklahoma Territory, and issued out of the Clerk's office of the Supreme Court of said Territory, giving the Appellants sixty days in which to perfect their appeal from the judgment of the Supreme court of said Territory.

That afterwards, to-wit: At the October Term, 1900, of said United States Supreme Court, as evidenced by a mandate therefrom, which said mandate hears date December 28, 1900, said appeal was docketed and dismissed with costs.

That afterwards, to-wit: On the 22d day of January 1901, a second Appeal of said cause was granted by the Hon. Bayard T. Hainer Associate Justice of the Supreme Court of said Territory, and issued out of the Clerk's office of the Supreme Court of said Territory, giving the Appellant thirty days in which to perfect said second appeal from said judgment of said Supreme Court of said Territory.

That afterwards, to wit: January 25, 1901, the Supersedeas bond herein was duly filed, approved and signed by the Hon. Bayard T. Hainer, Associate Justice as aforesaid, and a certified copy of the Citation in this cause was duly served on the attorney for Appellee on the 8th day of February, 1901.

In testimony whereof, I have caused the seal of said court to be hereunto affixed at the city of Guthrie, in the Territory of Oklahoma, on the

16th day of February, A. D. 1901.

BENJ. F. HEGLER,
Clerk Supreme Court of Oklahoma Territory.

Now, to-wit: On this 24th day of January, A. D. 1901, the appellants Daniel W. Harding and John Romig, having perfected their appeal from the judgment rendered against them in the above cause by the Supreme Court of the Territory of Oklahoma, to the Supreme Court of the United States of America, and now present their bond to stay proceedings under said judgment pending said appeal for approval; and it appearing that said Supersedeas bond is regular and sufficient, it is therefore ordered, considered and adjudged that all proceedings under said judgment in the Supreme Court of the Territory of Oklahoma, in the above cause, including the mandate from said Court, and all proceedings in the lower Court be and they are by this order Superseded and stayed pending the appeal of said Harding and Romig to the Supreme Court of the United States, and said Supersedeas Bond is hereby approved, and the mandate to the lower court recalled.

Witness my hand and seal of said Court this 24th day of Jan. A. D. 1901.

(Signed) BAYARD T. HAINER,
Associate Justice of the Supreme Court of Oklahoma Territory.